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UNITED STATES SUPREME COURT
OCTOBER 1990 TERM

DOUGLAS N. WASHBURN, Petitioner,	)	WRIT OF CERTIORARI FROM THE ILLINOIS SUPREME COURT
v.	)	
PEOPLE OF THE STATE OF ILLINOIS, Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

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(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether the revocation of a driver's license in Illinois of one found guilty of having an alcohol concentration in the breath of 0.10 or more but not guilty of driving under the influence of alcohol denies due process and equal protection under the Fourteenth Amendment.

2. Whether the statute which purports to authorize revocation of a driver's license in Illinois for driving with an alcohol concentration in the breath of 0.10 or more is unconstitutionally vague since it conflicts with a statute authorizing mandatory revocation of a driver's license for only one offense, driving under the influence of alcohol.

3. Whether the revocation of a driver's license in Illinois for driving with an alcohol concentration in the breath of 0.10 or more is arbitrary, capricious and unconstitutionally vague, since there is no way to accurately determine when the alcohol concentration in the breath reaches 0.10.

4. Whether trying the per se charge of driving with an alcohol concentration in the breath of 0.10 or more and the DUI charge of driving under the influence of alcohol in the same trial as two separate offenses with the same penalty places an accused in jeopardy twice for the same offense, drinking and driving.

5. Whether due process and equal protection of the law are denied when a petition for rehearing in a criminal case in the Appellate Court of Illinois is not ruled upon by the justice who had issued a written opinion in the case, as a result of the justice's death.

(b) LIST OF PARTIES

Douglas N. Washburn, petitioner.

People of the State of Illinois, respondent.

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(d) REFERENCE TO OPINION

People v. Washburn,
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(e) JURISDICTION OF THIS COURT

(i) The judgment sought to be reviewed is dated and was entered by the Appellate Court of Illinois for the Third District on January 10,1990.

(ii) An order denying a petition for rehearing is dated and was entered June 14, 1990

A petition for leave to appeal to the Illinois Supreme Court was denied on October 3, 1990. A petition for rehearing was denied on November 19, 1990

(iii) Jurisdiction to review the judgment of the Appellate Court of Illinois for the Third District and the denial of the Illinois Supreme Court to grant leave to appeal or grant rehearing is conferred by 28 U.S.C. 1257

F. CONSTITUTIONAL PROVISIONS STATUTES AND RULES

Fifth Amendment, U.S. Constitution

...nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb;...

Fourteenth Amendment, U.S. Constitution

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Illinois Constitution, Article 6, Section 5

...Each Appellate division shall have at least three judges...

Illinois Revised Statutes, ch 95½, par. 6-205

Mandatory revocation of license or permit-Hardship cases.

(a) Except as hereinafter provided, the Secretary of State shall forthwith revoke the license or permit of any driver upon receiving a report of such driver's conviction of any of the following offenses:

1. ...

2. Violation of Section 11-501 of this Code or a similar provision of a local ordinance relating to the offense of operating or being in physical control of a vehicle while under the influence of alcohol, other drug or combination thereof;

Illinois Revised Statutes, ch. 95½, par. 11-501

Driving while under the influence of alcohol, other drug, or combination thereof.

(a) A person shall not drive or be in actual physical control of any vehicle in this state while:

1. The alcohol concentration in such person's blood or breath is 0.10 or more based on the definition of blood and breath, units in Section 11-501.2;

2. Under the influence of alcohol;

Illinois Supreme Court Rule 22

(a) Divisions-Appellate Districts. ...

(b) Assignment to Divisions-Designation of Panels.

The Supreme Court shall assign judges to the various divisions. The presiding judge of a division shall designate judges serving in that division to sit in panels of three. Such a three-judge panel shall constitute the division for purposes of rendering a decision in a case. The Executive Committee of the First District, upon request of a division of that district, may designate any Appellate Court judge of that district to sit in the place of a judge of the requestion division for such case or cases as may be designated in the request.

(c) Decisions.

Three judges must participate in the decision of every case, and the concurrence of two shall be necessary to a decision. One judge may decide motions of course.

(g) STATEMENT OF THE CASE

The petitioner was arrested and charged with driving 7 miles per hour in excess of the speed limit, driving with an alcohol concentration in the breath of 0.10 or more and driving under the influence of alcohol (R. C22-H, I). The result of the breath test was 0.17. (R. C154). The case was tried by a jury in state circuit court. The petitioner was found guilty of driving 7 miles per hour in excess of the speed limit and driving with an alcohol concentration in the breath of 0.10 or more. The petitioner was found not guilty of driving under the influence of alcohol. Even though the petitioner had been found not guilty of driving under the influence of alcohol, his driver's license was revoked because the alcohol concentration in his breath was more than 0.10.

An appeal was taken and a three-judge panel of the Third District Appellate Court of Illinois, in an opinion written by Justice Wombacher, affirmed the petitioner's conviction. Justice Wombacher passed away on April 9,

1990. On May 11, 1990, the appellant filed a motion with the Third District Appellate Court to vacate the opinion since there was no longer the same three judge panel to rule on a petition for rehearing. The motion was denied. On June 14, 1990, the petitioner's petition for rehearing was denied.

The petitioner filed a petition for leave to appeal to the Illinois Supreme Court which was denied. A petition for rehearing before the Illinois Supreme Court was also denied.

The federal questions sought to be reviewed were first raised in the petitioner's post-trial motion to the state circuit court (R. C-25). The presiding judge denied the post-trial motion without specifically addressing the federal questions (R. C-65).

An appeal was taken to the Appellate Court of Illinois for the Third District which addressed the federal questions in a full opinion (Appendix, pages 1-11).

A petition for leave to appeal and petition for rehearing were filed and denied by the

Illinois Supreme Court without specifically addressing the federal questions.

(j) ARGUMENT

1. The revocation of a driver's license in Illinois under 11-501 of the Illinois Revised Statutes of one found guilty of having an alcohol concentration in the breath of 0.10 or more but not guilty of driving under the influence of alcohol denies due process and equal protection under the Fourteenth Amendment.

Paragraph 11-501 of Chapter 95½ of the Illinois Revised Statutes provides that the Secretary of State shall revoke the driver's license of any person convicted of driving a vehicle while:

(a) 1. The alcohol concentration in such person's breath is 0.10 or more;

(a) 2. Under the influence of alcohol.

The petitioner was tried before a jury simultaneously on charges of driving with an alcohol concentration in the breath of 0.10 or more (the per se charge) and driving under the influence of alcohol (the DUI charge). The petitioner was found guilty of the per se charge

and not guilty of the DUI charge.

The following undisputed facts were elicited during the trial:

a. No traffic accident was involved (R. C163);

b. No weaving was observed (R. C163-4);

c. No crossing of the center line was observed (R. C164);

d. No reckless driving was observed (R. C164);

e. No running of any red lights was observed (R. C165);

f. No failure to activate a turn signal before turning was observed (R. C171-172);

g. No charge of attempting to elude was involved (R. C172);

h. The petitioner was polite (R. C181);

i. The petitioner did not vomit, hiccup or belch (R. C181);

j. The petitioner did not seem confused (R. C182);

k. The petitioner's clothing was orderly (R. C182);

l. The petitioner was able to sign his name on a line of the officer's report (R. C187);

m. The petitioner knew the day of the week and the time of day and which city he was in (R. C188-189);

n. The arresting officer was able to understand all of the petitioner's answers to questions (R. C189).

The court instructed the jury that a person is under the influence of alcohol when as a result of drinking any amount of alcohol, the person's mental or physical faculties are so impaired as to reduce the person's ability to think and act with ordinary care (Illinois Pattern Jury Instruction 23.05, Modified). The jury found that the petitioner was able to think and act with ordinary care and found him not guilty of driving under the influence of alcohol. The jury found the petitioner guilty of driving with an alcohol concentration in the breach of 0.10 or more. Nevertheless, the court ordered that the petitioner's driver's license be revoked.

The petitioner suffered the same penalty under 11-501 as a person found guilty of DUI even though the petitioner was found not guilty

of DUI, the revocation of his driver's license. The petitioner might as well have pled guilty to the DUI charge. The jury verdict of not guilty meant exactly nothing. As applied to the petitioner, paragraph 11-501 denied the petitioner equal protection of the law. The petitioner was treated exactly the same under 11-501 as if he had been found guilty of DUI.

The main purpose of criminal law is to regulate conduct to prevent people from injuring other people. The fact that the petitioner may or may not have had alcohol on his breath does not have anything to do with the fact that the petitioner was conducting himself with ordinary care as the jury found. Even though the petitioner was conducting himself with ordinary care, the petitioner's driver's license was revoked, just the same as if the petitioner had been found guilty of not conducting himself with ordinary care and putting other people in danger. The per se charge of driving with an alcohol concentration in the breath of 0.10 should not bear the same punishment of revoca-

:ion of a driver's license as does the DUI charge of driving under the influence. The two charges are not identical. The per se charge of driving with an alcohol content in the breath of 0.10 or more is actually a lesser included offense of the DUI charge. The per se charge is also nothing more than a passive status offense and is more akin to the charge of illegal transportation of alcohol. On the other hand, the DUI charge of driving under the influence is a more culpable offense because it involves a finding of failure to exercise ordinary care which is a stricter standard. Revocation of a driver's license may be a proper punishment for the DUI charge of driving under the influence but revocation is an unfair, excessive and unconstitutional punishment for the per se charge of driving with an alcohol concentration in the breath of 0.10 or more. The punishment for the per se charge should be no greater than a suspension.

In its opinion the Appellate Court of Illinois for the Third District states that the revocation of a driver's license is no part of

the punishment administered by the court. Rather, revocation is a regulatory measure under the police power of the state governing traffic on the highways. The Appellate Court relied on the 1943 Illinois Supreme Court case of People v. Kobylak, 383 Ill. 432 (1943) which concluded that revocation does not constitute part of the punishment administered by the court because it does not constitute the loss of any property or civil right.

The Kobylak view is out of touch with the great body of civil rights law that has come into existence since 1943. The more enlightened view now is that the loss of a driver's license has a substantial impact not only on the defendant's liberty, but upon his financial resources, travel and occupation as well. U.S. v. Craner, 652 F. 2d 23 (9th Cir. 1981); Brady v. Blair, 427 F. Supp. 5 (1976).

Revocation of a license to operate a motor vehicle very often can work a substantial hardship upon its holder. Revocation of a driver's license is more serious for some individuals

than a brief stay in jail. Argersinger v. Hamlin, 407 U.S. 25 (1972); Richter v. Fairbanks, 903 F. 2d 1202 (8th Cir. 1990). It has been held that a person has a property interest in his driver's license. Doe v. Edgar, 721 F. 2d 619 (7th Cir. 1983).

It can be argued in this day and age that the right to retain a driver's license in the face of state action is a fundamental right, and that any state action to revoke a driver's license is subject to strict scrutiny. State action which would revoke a driver's license when one is found not guilty of the more culpable offense of driving under the influence of alcohol, but guilty of the status offense of having an alcohol concentration in the breath of 0.10 or more, does not survive strict scrutiny.

At the very least, state action which would revoke a driver's license under the same circumstances where one is found to be in the exercise of ordinary care does not survive rational basis scrutiny.

Not only did 11-501 of the Illinois Revised

Statutes deny the petitioner equal protection, it also denied the petitioner due process. In Illinois a person's driver's license can be revoked for committing the status offense of having an alcohol content in the breath of 0.10 or more. Furthermore, a state prosecutor is improperly allowed two opportunities to obtain the revocation of a driver's license by charging the per se offense and the DUI offense for the same predicate act, drinking and driving.

If a defendant exercises ordinary care and is found not guilty of driving under the influence of alcohol under 11-501, he still loses his driver's license if he has an alcohol concentration in the breath of 0.10 or more under 11-501. This is a denial of due process of law.

It is clear that the Due Process Clause applies to the deprivation of a driver's license by a State. Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 539 (1971).

The ability of an owner of an automobile to use it lawfully on the streets and highways, whether that ability be considered a "right"

or a "privilege", falls within the protection of the Due Process Clause of the Fourteenth Amendment. Earnhart v. Heath, F. Supp. 259 (1974).

11-501 of the Illinois Revised Statutes is unconstitutional as applied to the petitioner in that it deprived him of his liberty and property and denied him due process and equal protection in violation of the Fourteenth Amendment.

2. The revocation of a driver's license in Illinois under 11-501 of the Illinois Revised Statutes for driving with an alcohol concentration in the breath of 0.10 or more is unconstitutionally vague since paragraphs 6-205 and 11-501 of the Illinois Revised Statutes are in conflict.

Paragraph 6-205 of chapter 95½ of the Illinois Revised Statutes provides:

> Mandatory revocation of license or permit-Hardship cases.
>
> (a) Except as hereinafter provided, the Secretary of State shall forthwith revoke the license or permit of any driver upon receiving a report of such driver's conviction of any of the following offenses:
>
> 2. Violation of 11-501 of this Code or a similar provision of a local ordinance relating

to the offense of operating or being in physical control of a vehicle while under the influence of alcohol, other drug or combination thereof.

Paragraph 6-205 would logically lead one to believe that a driver's license in Illinois can only be manditorily revoked if one violates 11-501 by being convicted of driving under the influence of alcohol.

Paragraph 11-501 of the same chapter 95½ provides that a person shall not drive a vehicle while under the influence of alcohol or while the alcohol concentration in the breath is 0.10 or more. 11-501 further provides that driving privileges shall be revoked if one is convicted of violating this section.

Although 11-501 provides that driving privileges shall be revoked for violating this section, this can be read in conjunction with 6-205 as merely emphasizing and reinforcing the warning in 6-205 that driving privileges will be revoked only for driving under the influence. Furthermore, 2-605 provides that driving priv-

ileges will be revoked only for the violation of one offense, driving under the influence, which is a more culpable offense than driving with an alcohol concentration in the breath of 0.10 or more. 6-205 does not say that a driver's license will be revoked for driving with an alcohol concentration in the breath of 0.10 or more.

The Appellate Court of Illinois for the Third District in this case attempted to sidestep the issue of the vagueness of 11-501 by emphasizing that driving privileges can be revoked under 11-501 if a local ordinance similar to 11-501 is violated. Why the Appellate Court dwells on this aspect of 11-501 is unknown, since the Appellate Court itself admits in the first paragraph of its opinion that the petitioner was charged with violating state law rather than a local ordinance.

In its opinion the Appellate Court relied on Dornfield v. Julian, 104 Ill. 2d 261 (1984) for the proposition that a court must ascertain and give effect to the legislature's intent in

construing a statute. Dornfield also said a court must give effect to the legislature's intent consistent with the Constitution. Revocation of a driver's license for driving with an alcohol concentration in the breath of 0.10 or more is unconstitutionally vague because 6-205 and 11-501 of chapter 95½ of the Illinois Revised Statutes are in conflict such that the defendant did not know that violating 11-501 would result in revocation of his driver's license. 6-205 provides that a license will be mandatorily revoked for violating 11-501 by driving under the influence, period. 6-205 does not say that a driver's license will be revoked for violating 11-501 by driving with an alcohol concentration in the breath of 0.10 or more. Contrary to the opinion of the Appellate Court, it is certainly not clear that a driver's license can be revoked in Illinois for driving with a breath alcohol concentration of 0.10 or more.

The essential purpose of the "void for vagueness" doctrine is to warn individuals of th criminal consequences of their conduct. Jordan

v. De George, 341 U.S. -23 (1951). Paragraph 6-205 fails to warn that driving privileges will be revoked for driving with an alcohol concentration in the breath of 0.10 or more. A statute defining an offense must be sufficiently specific as to show the prohibition intended and the punishment to be imposed on the violator. The test is whether the statute is sufficiently definite and certain to enable one reading it to know his rights and obligations thereunder. People v. Robinson, 372 Ill. 503 (1939).

A statute fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. A law is vague unless it notifies a person of reasonable intelligence precisely what it prohibits so that the person may act accordingly. A statute may be successfully challenged as vague if it does not define the conduct regulated and thus afford an individual fair warning of what conduct is prohibited. Gigaccio v. State of

Pennsylvania, 382 U.S. 399.

When 11-501 is read in conjunction with 6-205, it is not definite and certain that a driver's license can be revoked for driving with an alcohol concentration in the breath of 0.10 or more. It is clear that the only offense for which a driver's license can be mandatorily revoked in Illinois is driving under the influence of alcohol. 11-501 is void for vagueness and unconstitutional in violation of the Fourteenth Amendment insofar as it is being utilized to revoke a driver's license for having an alcohol concentration in the breath of 0.10 or more. The proper penalty for having an alcohol concentration in the breath of 0.10 or more should be a suspension rather than revocation.

3. The revocation of a driver's license in Illinois under 11-501 of the Illinois Revised Statutes for driving with an alcohol concentration in the breath of 0.10 or more is arbitrary, capricious and unconstitutionally vague, since there is no way to accurately determine when the alcohol concentration in the breath reaches 0.10.

In its opinion in the petitioner's case, the Appellate Court of Illinois for the Third District agreed with the holding of the Appellate Court of Illinois for the Fourth District in People v. Kappas, 120 Ill. App. 3d 123 (4th Dist. 1983) that 11-501 of the Illinois Revised Statutes is a strict liability offense, that is, an offense that does not depend on motive, intent or knowledge, but on doing the prohibited act alone.

Contrary to the opinion in People v. Kappas, there is no rational basis for drawing the line at 0.10 as far as the analysis of one's breath is concerned. Even Kappas acknowledges that different individuals show different degrees of impairment based on the ingestion of the same amounts of liquor. In the petitioner's case, the jury found that the petitioner was not impaired even though his breath alcohol content was above 0.10 when it found the petitioner not guilty of driving under the influence. Where is the rational basis for arbitrarily selecting 0.10 as the cut-off and revoking the petitioner's

license. There is none.

As argued by the defendant in People v. Kappas, there is no way for one to accurately determine when the alcohol concentration of one's breath reaches 0.10, so that it is impossible to properly comport oneself with the statute's proscriptions. One division of the California Court of Appeals found unconstitutional the identical statute in that state. People v. Alfaro, 143 Cal. App. 3d 528 (1983). The Fourth District Appellate Court avoided this issue by simply finding that the statute is an absolute liability offense, and mental state or knowledge of the alcohol content of one's breath is irrelevant.

The Fourth District's analogy that failure to see a stop sign is no defense to failure to stop is not persuasive. A stop sign is painted red, has a distinctive shape and is erected at certain locations so that one will see it and stop. No one would ever think of doing away with a stop sign and relying on a motorist to judge for himself whether he should stop at an

intersection. But this is what is expected of a motorist in respect of the alcohol content of his breath. There is no stop-sign mechanism to warn him that the alcohol in his breath has reached 0.10.

The fact that the alcohol content in one's breath may reach 0.10 means nothing anyway. Different individuals show different breath alcohol levels and different degrees of physical impairment based on the injection of the same amounts of liquor. The petitioner was found to be unimpaired when the alcohol concentration of his breath exceeded 0.10. There are those who are impaired at 0.05. The revocation of a driver's license for driving with an alcohol concentration in the breath of 0.10 or more is arbitrary, capricious and unconstitutionally vague in violation of the Fourteenth Amendment, since there is no way for an individual to accurately determine when the alcohol concentration in one's breath reaches 0.10.

4. Trying the per se charge of driving with an alcohol con-

centration in the breath of 0.10 or more and the DUI charge of driving under the influence of alcohol in the same trial as two separate offenses with the same penalty places an accused in jeopardy twice for the same offense, drinking and driving.

In the case of People v. Malik, 113 Ill. App. 3d 206 (4th Dist. 1983), the Appellate Court of Illinois for the Fourth District stated that the per se charge of driving with an alcohol concentration in the breath of 0.10 or more and the DUI charge of driving under the influence arise out of the same act, involve the same proof and can be tried in the same trial. But in People v. Radcliff, 154 Ill. App. 3d 696 (4th Dist. 1987) the same Appellate Court stated that only one conviction can stand if the defendant is convicted of both offenses. If only one conviction can stand, there should be only one charge and only one prosecution. The prosecutor should be forced to elect only one charge on which to go to trial. Permitting only one conviction to stand is a tacit admission that a defendant is in fact being tried

twice for the same offense. Allowing a prosecutor two opportunities to obtain revocation of one's driver's license for committing one offense, drinking and driving, violates the right not to be placed in jeopardy twice for the same offense under the Fifth and Fourteenth Amendments.

The purpose of protection against double jeopardy is to protect an accused from the unfair harassment of successive trials. U.S. v. Goldman, 352 F. 2d 263 (3d Cir. 1965). Successive trials under the guise of a single trial occur when an accused is prosecuted in Illinois on the per se charge and the DUI charge in the same trial. The per se charge and the DUI charge actually state the same offense, drinking and driving, and carry the same penalty, revocation of one's driver's license. By trying an accused on both the per se charge and the DUI charge in the same trial, a prosecutor in Illinois has two chances of getting a guilty verdict in the same trial on one offense, drinking and driving, and then revoking an accused's driver's license.

5. The petitioner was denied due process and equal protection of the law in the Appellate Court of Illinois when his petition for rehearing was not ruled upon by the justice who had issued a written opinion in his case, as a result of the justice's death.

The petitioner's conviction for driving with an alcohol concentration in the breath of 0.10 or more was affirmed by the Appellate Court of Illinois for the Third District in an opinion written by Justice Wombacher, who subsequently passed away. The petitioner moved to vacate the opinion because of Justice Wombacher's death and to reschedule the case for oral argument. The motion was denied. On June 14, 1990, the petitioner's petition for rehearing was denied without Justice Wombacher, who had passed away, and presumably by Justices Heiple and Barry, the remaining two members of the three-judge panel.

Article VI, section 5 of the Illinois Constitution provides that each Appellate Division shall have at least three judges. This section further provides that a majority of a division constitutes a quorum and the concurrence of a

majority of the division is necessary for a decision.

Illinois Supreme Court Rule 22(b) provides that a three-judge panel shall constitute a division for purposes of rendering a decision in a case in the Appellate Court. Supreme Court Rule 22(c) provides that three judges must participate in the decision of every case and the concurrence of two shall be necessary for a decision. Since a final judgment of a Circuit Court is appealable as a matter of right under Article VI, section 6 of the Illinois Constitution, it is constitutionally required that three judges participate in the "decision" of every case (Arlington City Cab Co., v. Regional Transp., 82 Ill. 2d 458 (1980). Since "decision" necessarily encompasses the initial opinion and of the ruling on the petition for rehearing, one has a constitutional right to have the same three judges, including the judge who wrote the initial opinion, decide the petition for rehearing.

Justice Wombacher who wrote the opinion of

the Appellate Court, did not decide the petition for rehearing because of his untimely death. The petitioner in this case has been deprived of the "decision" contemplated by the Illinois Constitution and Illinois Supreme Court Rule 22 because the judge who wrote the opinion in his case did not participate in the ruling on the petition for rehearing. A litigant has a constitutional right to present a petition for rehearing to the same judge who wrote the opinion in his case. This judge spent the most time out of all the judges on the panel analyzing the appellant's arguments and issuing a written opinion.

The petitioner was denied due process and equal protection under the Fourteenth Amendment when his petition for rehearing before the Apellate Court was not ruled upon by the judge who wrote the opinion in his case. The opinion written by Justice Wombacher should be vacated.

WHEREFORE, the petitioner DOUGLAS N. WASHBURN prays that this court grant this petition for writ of certiorari and order that the

opinion of the Appellate Court of Illinois for the Third District be vacated or otherwise reversed.

DOUGLAS N. WASHBURN, PETITIONER,

BY _____
HIS ATTORNEY

APPENDIX

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1. Opinion of Justice Wombacher of the Appellate Court of Illinois for the Third District, People v. Washburn, L-10-90

2. Order of the Appellate Court of Illinois for the Third District denying the petition for rehearing of Douglas N. Washburn, 6-14-90

3. Order of the Appellate Court denying the petition for rehearing, 6-14-90

4. Order of the Illinois Supreme Court denying a petition for leave to appeal, 10-03-90.

5. Order of the Illinois Supreme Court denying a motion to reconsider and for rehearing, 11-19-90

No. 3-89-0012
(Consolidated with Nos. 3-89-0013, 3-89-0014, & 3-89-0015)

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D. 1989

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of La Salle County
Plaintiff-Appellee,	)	Nos. 88 TR 6919 88 TR 6920 88 TR 6821 88 TR 6822
v.	)	
DOUGLAS N. WASHBURN,	)	
Defendant-Appellant.	)	Honorable James Lanuti Judge Presiding

JUSTICE WOMBACHER delivered the opinion of the court:

Following a jury trial, defendant Douglas N. Washburn, Jr. was found guilty of speeding (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-601) and driving with a breath alcohol concentration of .10 or more. (Ill. Rev. Stat. 1987, ch.95 1/2 par. 11-501(a)(1).) The defendant was found not guilty of driving under the influence of alcohol. (Ill. Rev. Stat. 1987, ch. 95 1/2 par. 11-501(a)(2).) The defendant was sentenced to a fine of

$750.00 and a one year term of probation. Defendant also had his driver's license revoked by the Secretary of State. Defendant appeals.

The record reveals the following information. Defendant was southbound on Illinois Route 351 near U.S. Route 6 at approximately 1:55 a.m. on May 17, 1988. Illinois State Trooper Tim Reppin was northbound on Route 351 and observed the defendant's vehicle coming toward him. Trooper Reppin estimated that the defendant was travelling in excess of the posted 30 m.p.h. speed limit and activated his radar unit. The radar unit indicated that the defendant was travelling 37 m.p.h. The trooper allowed the defendant's automobile to pass, made a u-turn and eventually stopped the defendant several blocks away.

The defendant displayed behavior and symptoms consistent with being under the influence of alcohol. As a result, Trooper Reppin asked the defendant to perform several field sobriety tests. The defendant was unable to satisfacto-

placed the defendant under arrest for driving under the influence of alcohol and speeding.

The defendant was administered a breathalyzer test at 2:27 a.m. The test results indicated that the defendant's blood alcohol content, as measured from his breath, was .17. Later the same day, the defendant was charged by complaint with driving with an alcohol concentration in his breath of .10 or more.

At trial the defendant's wife testified that at 3:00 a.m. on May 17, 1988, the defendant appeared to be "in control." The defendant testified that he had been at his brother's house the night in question and that he had consumed some alcoholic beverages prior to 11:00 p.m. At approximately 2:00 a.m., the defendant left his brother's house to check on the closing of a tavern he owned in La Salle. The defendant testified that his difficulty in performing the field sobriety tests was the result of an operation that he had that replaced a bone in his neck with a piece of bone from his hip. The defendant also testified

that he wears a bottom plate denture; that this denture retains odors; and that this was why the trooper smelled alcohol on his breath.

The jury returned a guilty verdict in regard to the speeding and driving with an alcohol concentration in the breath of .10 or more charges and a not guilty verdict in the driving under the influence charge. Defendant appeals, raising several errors.

The defendant initially contends that no probable cause existed to stop his vehicle. The defendant maintains that the stop of his vehicle was a roving patrol sham stop and was, therefore, illegal. We cannot agree.

A traffic violation generally provides sufficient basis to warrant an investigatory stop by the police. (People v. Houlihan (1988), 167 Ill. App. 3d 638, 521 N.E.2d 277.) In the instant case Trooper Reppin testified that as the defendant's vehicle approached, he estimated that it was travelling at a speed in excess of the posted speed limit of 30 m.p.h. The trooper activated his radar unit which in-

dicated that the defendant's vehicle was travelling at a speed of 37 m.p.h.

The defendant contends that a difference of seven miles per hour in speed is not discernible. We view it differently and feel that the focus should not be on the seven miles per hour but rather on the relation of the alleged spped to the posted speed limit. In this situation the defendant was travelling 120% of the posted speed limit. We are of the opinion that many people, especially trained law enforcement officers, are able to estimate when a vehicle is travelling in excess of the speed limit. Here, Trooper Reppin had such a suspicion, activated his radar unit and confirmed that suspicion. Since the trooper stopped the vehicle for a discernible traffic violation, probable cause existed for the stop and the stop was lawful.

The defendant next raises three issues attacking the constitutionality of Ill. Rev. Stat. 1987, ch. 95 1/2 par. 11-501. This section provides, in pertinent part:

> "11-501. Driving while under the influence of alcohol, other drug, or combination thereof.
> (a) A person shall not drive or be in actual physical control of any vehicle within this state while:
>
> 1. The alcohol concentration in such person's blood or breath is 0.10 or more based on the definition of blood and breath units in Section 11-501.2;
> 2. Under the influence of alcohol;
> 3. Under the influence of any other drug or combination of drugs to a degree which renders such person incapable of safely driving; or
> 4. Under the combined influence of alcohol and any other drug or drugs to a degree which renders such person incapable of safely driving."

This section also provides that the Secretary of State shall revoke the driving privileges of any person convicted under this section.

The defendant first argues that the revocation of a driver's license for driving wi an alcohol concentration in the breath of .10 or more is excessive and unconstitutional. The defendant asserts that "driving under the influence of alcohol: is a more culpable offense that "driving with an alcohol concentra

tion in the breath of .10 or more." The defendant argues that since he was only found guilty of the latter offense, it is improper to revoke his driver's license. In effect, the defendant maintains that he is being punished for being under the influence of alcohol when he was convicted of driving with an alcohol concentration in the breath of .10 or more.

The defendant assumes that his revocation of a driver's license is a punishment; i.e. part of his sentence. He is mistaken. The revocation of one's driver's license by the Secretary of State is part of the regulatory measures under the police power of the State governing traffic upon the highways. It is no part of the punishment administered by the court. People v. Finley (1974), 21 Ill. App. 3d 335, 315 N.E.2d 229; People v. Jenkins (1970), 128 Ill. App. 2d 351, 262 N.E.2d 105; People v. Kobylak (1943), 383 Ill. 432, 50 N. E.2d 465.

The State's power to regulate traffic on

its highways has long been recognized. (Chicago Park District v. Canfield (1939), 370 Ill. 447, 19 N.E.2d 376.) The exercise of such power must bear some substantial relation to the public good. (Chicago Park District, 370 Ill. 447, 19 N.E.2d 376.) We are of the opinion that the legislature properly exercised its power in making revocation of a driver's license mandatory regardless of how section 11-501 is violated.

The defendant's second contention is that the "punishment," i.e. revocation of his driver's license, to be imposed for driving with an alcohol concentration in the breath of .10 is unconstitutionally vague. As noted above, revocation of one's driver's license is not punishment for the offense but rather a collateral regulatory consequence of a section 11-501 conviction. What defendant intends to argue on appeal is that Ill. Rev. Stat. 1987, ch. 95 1/2 par. 6-205 (Mandatory revocation of license or permit-Hardship cases) and Ill. Rev. Stat 1987, ch. 95 1/2

par. 11-501 are in conflict such that the defendant did not know that a violation of section 11-501 would result in revocation of his driver's license. The defendant's contention fails to withstand analysis.

Ill. Rev. Stat 1987, ch. 95 1/2 par 6-205 provides, in pertinent part:

> "6-205. Mandatory revocation of license or permit-Hardship cases. (a) Except as hereinafter provided, the Secretary of State shall forthwith revoke the license or permit of any driver upon receiving a report of such driver's conviction of any of the following offenses:
>
> . . .
>
> 2. Violation of Section 11-501 of this Code or a similar provision of a local ordinance relating to the offense of operating or being in physical control of a vehicle while under the influence of alcohol, other drug, or combination thereof;"

The defendant reads this section as "violation of Section 11-501 of this Code . . . relating to the offense of operating or being in physical control of a vehicle while under the influence of alcohol, other drug, or

combination thereof;" The defendant contends that since operating a vehicle with an alcohol concentration in the breath of .10 or more is not present in the language, section 6-205 doesn't advise the public that a section 11-501 conviction for operating a vehicle with an alcohol concentration in the breath of .10 or more will result in a revocation of their driver's license.

In construing a statute, a court must ascertain and give effect to the legislature's intent. (Dornfeld v. Julian (1984), 104 Ill. 2d 261, 472 N.E.2d 431.) We believe the defendant has misconstrued this section. We think it is clear that the Secretary of State is directed to revoke the license of any person convicted under either section 11-501 or a local ordinance similar to section 11-501. This interpretation provides for uniform regulatory treatment throughout the state for persons convicted under section 11-501 or a section 11-501-type local ordinance.

The defendant's third attack on the con-

stitutionality of section 11-501 alleges that the aspect of the statute which proscribes driving with an alcohol concentration in the breath of .10 or more is unconstitutionally vague. The appellate court, in People v. Kappas (1983), 120 Ill. App. 3d 123, 458 N.E. 2d 140 has already addressed this issue. Kappas held that the statute in question is an absolute liability offense and that the proscribed conduct, driving with a breath alcohol content of .10 or more, is manifestly clear. We agree with this holding and therefore reject the defendant's argument on this point.

The defendant raises several other issues on appeal. After careful consideration of both parties' oral arguments, briefs and the record before us, we are of the opinion that these issues are without merit.

For the reasons listed above, the decision of the circuit court of La Salle County is affirmed.

Affirmed.
HEIPLE, P.J., and BARRY, J., concur.

STATE OF ILLINOIS

THIRD DISTRICT APPELLATE COURT

Be it Remembered, That, to wit: On the 14th day of June, 1990, certain proceedings were had and orders made and entered of record by said Court, among which is the following,viz

3-89-0012 (Consolidated with 3-89-0013, 3-89-0014 & 3-89-0015)

People of the State of Illinois,
Appellee,

vs.

Douglas N. Washburn,
Appellant.

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Kenneth A. Kozel, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support there of, and being now fully advised in the premises

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/S/ ROGER A. JOHNSON
Clerk of the Appellate Court

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, IL 62706
(217) 782-2035

October 3, 1990

Mr. Kenneth A. Kozel
Attorney at law
210 Joliet Street
LaSalle, IL 61301

No. 70533 - People State of Illinois,respondent,
v. Douglas N. Washburn,petitioner.
Leave to appeal, Appellate Court,
Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

NO. 70533

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS N. WASHBURN,

DEFENDANT-PETITIONER.

ORDER

Motion to Reconsider and Grant the Petition for Leave to Appeal is DENIED.

FILED

NOV 19 1990

SUPREME COURT CLERK